The EU Withdrawal Bill – possible implications for public procurement law

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The European Union (Withdrawal) Bill was introduced to Parliament during July.

The Bill broadly reflects the Government's intentions as set out in the March 2017 White Paper on *Legislating for the United Kingdom's withdrawal from the European Union* (considered in a previous article here), although its name (which was to be the "Great Repeal Bill") has changed.

There may, of course, be further changes during the Bill's passage through Parliament. It may have to be phased in if there are transitional arrangements between the current EU-UK relationship and whatever is to follow, and it may have to be significantly re-written if (for example) the UK is to retain single market membership for any period.

Nonetheless, it is possible at this stage to identify some of the consequences for domestic law if the Bill is enacted broadly in its current form. This article considers the potential impacts on public procurement law, which may change in some subtle (and some more significant) ways.

1. **The EU-derived domestic procurement legislation will remain part of domestic law**.[1] This includes measures such as the Public Contracts Regulations 2015 (SI 2015/102) ("**the PCR15**"), the Utilities Contracts Regulations 2016 (SI 2016/274), the Concessions Contracts Regulations 2016 (SI 2016/273) and the Defence and Security Public Contracts Regulations 2011 (SI 2011/1848).

2. **The provisions of the EU procurement directives and the EU Treaties will retain their force in domestic law** as it was recognised immediately prior to exit day, at least insofar as they provide "*rights, powers, liabilities, obligations, restrictions, remedies and procedures*" which have been recognised in judicial decisions prior to exit day.[2]

   The wording of this provision in the Bill creates some ambiguity, but the detailed Explanatory Notes to the Bill suggest that (at least) directly effective EU law rights will be preserved in this way.[3] There is also reason to conclude that the interpretation of the retained EU measures will remain largely the same, as explained further below.

3. **Pre-exit EU law will retain its supremacy over pre-exit domestic law**.[4] This seems to mean that the old domestic legislation will continue to be interpreted in a manner designed to ensure compliance with the old underlying EU Directives.[5] Also, if it should be determined on or after exit day that the old domestic procurement

[1] European Union (Withdrawal) Bill 2017-19 ("**EUWB**"), cl 2(1)
[2] EUWB, cl 4(1)
[3] See for example the Explanatory Notes at paragraphs 87 and 92
[4] EUWB, cl 5(2)
[5] EUWB, cls 5(2) and 6(3)

Regulations failed properly to implement the underlying Directives in some respect, and that failure cannot be remedied by means of conforming interpretation, the old EU law would take precedence (at least as against an emanation of the State) by virtue of the doctrine of vertical direct effect.[6]

However old EU law will not have supremacy over *new* (post-exit) domestic legislation, unless "*the application of the [supremacy] principle is consistent with the intention of the modification*" of the domestic rules.[7] So if changes are made to the domestic procurement Regulations on or after exit day, those changes can depart from the old EU law.

4. **Past decisions of the EU Court of Justice ("CJEU") will, as a general rule, continue to determine how the domestic Regulations and underlying Directives are interpreted**.[8] This, again, will continue to be the case until the domestic law is modified. However the UK Supreme Court will no longer be bound to follow previous CJEU decisions; it will enjoy the same freedom to depart from CJEU decisions as from its own previous decisions.[9] So, after exit day, parties will be able to argue before the Supreme Court that the old rules should be interpreted differently.

5. **Future decisions of the CJEU will be, at best, of persuasive authority only**. National courts will not be bound by future CJEU decisions, nor required to have regard to them, but may do so "*if [they] consider it appropriate*".[10] As noted previously, it remains to be seen whether domestic courts (at least below the Supreme Court), which will be bound by the CJEU's past jurisprudence, prove ready to adopt interpretations which diverge from the CJEU's *future* jurisprudence.[11] But some divergence seems inevitable, since rights (etc) which arise under retained EU Directives but are recognised by the CJEU only after exit day will not become part of domestic law.[12]

6. **There will be no right to sue for breach of general principles of EU law**.[13] Similarly, no award decision (or other decision in the procurement context) will fall to be set aside for breach of general principles of EU law.[14]

   There is some uncertainty as to how this will impact on public procurement law, and particularly on the general principles of transparency and equal treatment.

   For above-threshold contracts, the requirements of equal treatment and transparency are laid down by the domestic legislation and the underlying Directives.[15] For reasons set out above, these requirements will remain fully enforceable, unless the domestic legislation is modified post-exit.

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[6] EUWB, cls 5(2) and 6(3); cf e.g. *Alstom v Eurostar* [2012] EWHC 28 (Ch) at [34] to [48]
[7] EUWB, cls 5(1), 5(3)
[8] EUWB, cl 6(3)
[9] EUWB, cls 6(4)(a), 6(5)
[10] EUWB, cls 6(1), 6(2)
[11] Cf EUWB, cl 6(3)(a)
[12] Cf EUWB, cls 4(1), 4(2)(b); also, as regards general principles of EU law, cl 5(6) and Sch 1, para. 2
[13] EUWB, cl 5(6); Sch. 1, para. 3(1)
[14] EUWB, cl 5(6); Sch. 1, para. 3(2)(b)
[15] See e.g. PCR15, r. 18(1); Directive 2014/24, Art. 18(1)

However at present EU law requires a contracting authority which seeks to award a below-threshold contract to comply with the general principles of transparency and equal treatment if the opportunity is of cross-border interest.[16] Although these principles are derived from specific provisions in the Treaty on the Functioning of the EU ("**TFEU**"), there seems to be at least a good chance that they will constitute "general principles of EU law" within the meaning of the Bill, and thus that the right to sue for their breach, or seek the setting aside of administrative action by reason of their breach, will be lost. In practice, then, a contracting authority awarding a below-threshold contract post-exit may have to comply only with the (relatively limited) requirements of the domestic legislation in relation to below-threshold contracts.[17]

On the other hand, as noted above, the directly effective provisions of the TFEU will retain their force in national law. An action may therefore lie against a decision taken in the context of a below-threshold procurement on the grounds that it directly infringes Article 49 TFEU on freedom of establishment, or Article 56 TFEU on the free movement of services, as distinct from the general principles derived from those provisions. This may give rise to novel questions of law for the domestic courts, which will be unable to refer questions on the interpretation of the EU provisions to the CJEU.[18]

7. **There will be "*no right in domestic law on or after exit day to damages in accordance with the rule in* Francovich".**[19] This is potentially significant in the public procurement context.

   In a line of cases starting with C-6/90 and C-9/90 *Francovich and Others*, the CJEU has recognised a right to damages for breach of EU law by a Member State, where three conditions are met: the EU rule which has been infringed must be "*intended to confer rights on individuals*", the breach of that rule must be "*sufficiently serious*", and there must be a "*direct causal link between the breach and the loss or damage sustained by the [claimant]*".[20]

   The CJEU in Case C-568/08 *Spijker* held that the right to damages under the public procurement Remedies Directive (89/665) "*gives concrete expression to the principle of State liability for loss and damage caused to individuals as a result of breaches of EU law*", and therefore arises only when the *Francovich* conditions are met.[21] The UK Supreme Court in *NDA v EnergySolutions* [2017] UKSC 34 held that the domestic Public Contracts Regulations 2006 (the precursor to the PCR15) were similarly limited, and so "*should be read as providing for damages only upon satisfaction of the* Francovich *conditions*".[22]

[16] See e.g. Case C-298/15 *Borta* EU:C:2017:266 at paragraph 36
[17] See e.g. PCR15, rr. 109-112
[18] See EUWB, cl 6(1)(b)
[19] EUWB, cl 5(6); Sch 1 para. 4
[20] See Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357, paragraph 35; Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029, paragraphs 31 and 51; Case C-445/06 *Danske Slagterier* [2009] ECR I-2119, paragraphs 19 and 20
[21] Case C-568/08 *Combinatie Spijker* [2010] ECR I-12655 at paragraphs 86-87
[22] *Nuclear Decommissioning Authority v EnergySolutions* [2017] UKSC 34 at [39]

On this basis, it is at least arguable that if the new Bill abolishes *Francovich* liability in the UK, the right to damages under the domestic procurement legislation will be lost. However the Explanatory Notes to the Bill make clear that this is not the intended consequence.[23] Given the case law, the point would perhaps merit express clarification in the legislation.

Assuming that the right to damages under the domestic procurement legislation will *not* be lost, it would seem odd to retain the *Francovich* conditions in this context post-exit: the argument (accepted by the Supreme Court in *EnergySolutions*) that it is the legislative intention for the *Francovich* conditions to apply will be somewhat brittle in circumstances where *Francovich* liability is no longer recognised in domestic law. The Supreme Court's *EnergySolutions* decision may therefore be ripe for re-opening after exit day.

8. **The EU Charter of Fundamental Rights will not be part of domestic law**.[24] This may be of some incidental relevance in public procurement, insofar as the Charter provides rights to the protection of confidential information and to an effective remedy (for example).[25] However the Bill, while excluding the Charter from the body of EU law retained in the UK after Brexit, seems nonetheless to preserve the *content* of the Charter in the form of "*fundamental rights and principles*" which *are* to be retained in domestic law.[26]

   There is an ambiguity in the wording of the Bill as to whether those fundamental rights constitute "*general principles of EU law*", so that the right to sue for, or challenge administrative action on the basis of, their breach will be barred by Schedule 1 (as discussed above). The Explanatory Notes to the Bill suggest that this *is* the intended consequence.[27]

9. **The domestic procurement Regulations may be amended**. The Bill creates powers to pass secondary legislation amending or replacing retained EU Law (including the domestic procurement Regulations) in order "*to prevent, remedy or mitigate*" any "*failure […] to operate effectively*", or "*any other deficiency*", which arises "*from the withdrawal of the United Kingdom from the EU*".[28] The Bill goes on to give examples of such deficiencies, including where the old law "*makes provision for […] arrangements […] which no longer exist, or are no longer appropriate*" in the light of the UK's withdrawal.[29]

   This power might, for example, be used to amend the domestic Regulations in order to limit the rights of companies from other EU Member States to participate in public procurement processes, or challenge decisions, in the UK. However this would presumably depend on the outcome of negotiations over future trading relationships between the UK and the EU.

[23] See paragraph 156
[24] EUWB, cl 5(4)
[25] Charter of Fundamental Rights of the European Union (OJ 2012/C 326/02), Articles 7, 47; Case C-450/06 *Varec* [2008] ECR I-581 at paragraphs 48 to 51; Cases C-439/14 and C-488/14 *Star Storage* EU:C:2016:688 at paragraph 46
[26] EUWB, cl 5(5); see the Explanatory Notes at paragraph 99
[27] See e.g. paragraph 50
[28] EUWB, cl 7(1)
[29] EUWB, cl 7(2)(e)

Similarly, this power might be used to introduce measures clarifying that the *Francovich* conditions no longer apply to an action for damages under the PCR15 after Brexit; or perhaps to abolish entirely the right to damages for breach of the public procurement rules.

If other, more comprehensive changes are to be made, it may be that primary legislation is required. Depending on the UK's international obligations after Brexit, we could see a unified Public Procurement Act in the future, based on rather different arrangements.